No. 06-984

In The
Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the *Avena* judgment in the cases of the 51 Mexican nationals named in the judgment?

2. Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the *Avena* judgment in the cases that the judgment addressed?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief in support of Respondent. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the Nation, including Texas.

MSLF has been actively involved in litigation aimed at securing the proper interpretation of the Constitution in accordance with the Framers' intent, including *Adarand Constructors v. Peña*, 515 U.S. 200 (1995), *Mountain States Legal Foundation v. National Wildlife Federation*,

[1] A copy of the consent letter received from Respondent has been filed with the Clerk of the Court; the Petitioner has filed a general consent with the Clerk. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

497 U.S. 1020 (1990), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

STATEMENT OF THE CASE

On June 24, 1993, José Ernesto Medellín, a Mexican national, raped and murdered two young teenage girls in Houston, Texas. Medellín confessed, was convicted of murder during the course of a sexual assault, and sentenced to death. At the time of the trial, Medellín, who was represented by two court-appointed attorneys, was not aware of, and did not assert any claim under the Vienna Convention, which requires, *inter alia*, that detaining authorities notify a detained foreign national of his right to request assistance from the consul of his own country. After his conviction was affirmed by the Texas Court of Criminal Appeals in an unpublished order, Medellín contacted the Mexican consulate. Shortly thereafter, consular authorities filed an application for *habeas corpus* on Medellín's behalf in Texas state court in which Medellín alleged, for the first time, a violation of his rights under the Vienna Convention. This application was denied, and, in an unpublished order dated September 7, 2001, the Texas Court of Criminal Appeals again affirmed.

On November 28, 2001, Medellín filed a petition for a *writ* of *habeas corpus* in federal court in which he, again, alleged Vienna Convention violations. *See Medellín v. Cockrell*, No. H-01-4078 (S.D. Tex. June 25, 2003). On June 26, 2003, the federal district court rejected the petition, holding that Medellín's failure to raise his Vienna Convention claim at trial, as required by Texas' contemporaneous-objection rule, barred federal *habeas* review. *Id.*

This decision was appealed to the Fifth Circuit Court of Appeals. *See Medellín v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

Meanwhile, in early 2003, Mexico initiated proceedings against the United States in the International Court of Justice (ICJ) in the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. 12 (hereafter "*Avena*"), alleging a violation of the Vienna Convention rights of 52 Mexican nationals, including Medellín. The ICJ held, *inter alia*, that the United States had violated the Vienna Convention by failing to notify the detained Mexican nationals of their right to consult the Mexican consul. *Id.* The ICJ further held that Medellín was entitled to a review and reconsideration of his conviction, and that procedural *habeas corpus* rules could not bar such review and reconsideration. *Id.*

Although the Fifth Circuit acknowledged the recently-released *Avena* judgment, it held, *inter alia*, that it was bound by *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*), in which this Court held that Vienna Convention claims are subject to procedural default rules. *Medellín v. Dretke*, 371 F.3d 270. Therefore, the Fifth Circuit affirmed the denial of *habeas corpus* relief, and Medellín subsequently petitioned this Court for *certiorari*, which was granted on December 10, 2004.

While the case was pending before this Court, President Bush issued a "Memorandum for the Attorney General," which proclaimed that "State courts give effect to the [*Avena*] decision in accordance with general principles of comity. . . ." Pet. App. 187a. Thereafter, Medellín filed another application for a *writ* of *habeas corpus* in Texas state court. Based in part on the presidential

memorandum, and in part on the filing of Medellín's new state *habeas corpus* application, this Court dismissed the *writ* of *certiorari* as improvidently granted. *Medellín v. Dretke*, 544 U.S. 660 (2005).

In his state *habeas corpus* application, Medellín argued, *inter alia*, that both the *Avena* decision and the executive memorandum supersede Texas' *habeas corpus* rules, which would otherwise bar Medellín from raising his *habeas corpus* arguments. However, the Texas Court of Criminal Appeals, citing *Sanches-Llamas v. Oregon*, __ U.S. __, 126 S.Ct. 2669 (2006), held that *Avena* does not preempt Texas' *habeas corpus* rules. Additionally, a plurality of the court concluded that the executive memorandum does not preempt Texas' procedural rules. *Ex parte Medellín*, 206 S.W.3d 584 (Tex. Crim. App. 2005). Thereafter, Medellín petitioned this Court for *certiorari*, which was granted on April 30, 2007. *Medellín v. Texas*, __ U.S. __, 127 S.Ct. 2129 (2007).

SUMMARY OF THE ARGUMENT

Under Article III of the U.S. Constitution, the judicial power is vested solely in U.S. courts. Both the ICJ and the U.S. Supreme Court have interpreted the Vienna Convention, and have reached differing opinions as to whether the Vienna Convention requires state courts to ignore their *habeas corpus* procedural rules. Medellín alleges that Texas courts are compelled to adopt the ICJ's interpretation of the Vienna Convention, even if doing so would require the Texas courts to ignore this Court's own interpretations of the Vienna Convention in *Breard* and *Sanches-Llamas*. This Court should reject Medellín's

arguments because, pursuant to Article III, an international tribunal lacks the power to interpret treaties entered into by the United States.

Medellín also alleges that President Bush's memorandum compels Texas courts to "give effect" to the ICJ's decision in *Avena*. This argument also should be rejected because in issuing the memorandum the President exceeded his Article II power. Specifically, his actions were both *ultra-vires* and an infringement upon the constitutional doctrines of separation of powers and a limited federal government.

ARGUMENT

I. ARTICLE III OF THE CONSTITUTION PROHIBITS THE PRESIDENT, WITH THE ADVICE AND CONSENT OF THE SENATE, FROM CONFERRING JURISDICTION OVER TREATIES TO AN INTERNATIONAL TRIBUNAL.

A. Article III Is An Absolute Prohibition Against Vesting The Power To Interpret Treaties In The ICJ.

At the time of the *Avena* judgment, the United States was a party to the Optional Protocol to the Vienna Convention.[2] Optional Protocol Concerning the Compulsory Settlement of Disputes ("Optional Protocol"), Apr. 24, 1963, [1970] 21 U.S.T. 325, T.I.A.S. No. 6820. This Optional

[2] The United States has since withdrawn from the Optional Protocol. Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005) (giving notice of United States' withdrawal from the Optional Protocol).

Protocol provided, *inter alia*, that the ICJ would have exclusive "compulsory jurisdiction" over "the interpretation or application" of the Vienna Convention in all cases brought by a party to the Convention. *Id.*

Medellín argues that, because the United States has a treaty obligation to give effect to ICJ judgments interpreting the Vienna Convention, state courts are bound by ICJ opinions pursuant to the Supremacy Clause. Brief For Petitioner at 26-28. This contention assumes that the President, with the advice and consent of the Senate, has the power to confer jurisdiction over treaties to the ICJ. Under Article III of the Constitution, however, the President lacks such power.

Article III provides that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. "The language of Article III itself, of course, admits of no exceptions. . . ." *Granfinanciera v. Nordberg*, 492 U.S. 33, 66 (1989) (Scalia, J., concurring). This particular clause of Article III prohibits the President from transferring jurisdiction to other, non-Article III tribunals "'for the purpose of emasculating' constitutional courts. . . ." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 850 (1986) (holding that a statutory grant of power to a commission to hear certain state law counterclaims does not violate Article III.) (citing *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 644 (1949) (Vinson, C.J., dissenting)).

The purpose of this strict separation of the judicial power from the executive and legislative branches is well known. "The Framers knew that '[t]he accumulation of all

powers, Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *Schor*, 478 U.S. at 859-60 (Brennan, J., dissenting) (citing *The Federalist* No. 46 (James Madison)). "The Framers also understood that a principal benefit of the separation of the judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures." *Id.* at 860. To that end, once confirmed, a justice serves a life-term. U.S. Const. art. III, § 1. "[T]he Framers of the Constitution believed that those protections were necessary in order to guarantee that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures and thus able to enforce constitutional principles without fear of reprisal or public rebuke." *U.S. v. Raddatz*, 447 U.S. 667, 704 (1980) (Marshall, J., dissenting) (citing *The Federalist* Nos. 78, 79 (Alexander Hamilton)); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion); *O'Donoghue v. U.S.*, 289 U.S. 516, 530 (1933). Likewise, Hamilton explained that the Supreme Court would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *Roper v. Simmons*, 543 U.S. 551, 607-08 (2003) (Scalia, J., dissenting) (citing *The Federalist* No. 78 (Alexander Hamilton)).

In contrast, the United Nations charter annexes the Statute of the ICJ (U.N. Charter art. 92), which, in turn, provides that ICJ judges are elected by the General Assembly and the Security Council to nine-year terms, Statute of the ICJ, art. 4, and may be re-elected. *Id.*, art. 13. Therefore, an ICJ judge who ascribes to an opinion,

deemed unpopular by certain foreign countries, could ultimately lose his re-election bid as a result of the votes of certain U.N. ambassadors who may be subject to majoritarian pressures. Not only does this voting process hamstring the independence of the ICJ, but also the voting member nations may not have the best interests of the United States or the fidelity of the U.S. Constitution at heart.

Furthermore, rather than being bound by precedent, the decisions rendered by the ICJ have "no binding force except between the parties and in respect of that particular case." *Id.*, art. 59. Thus, the ICJ lacks some of the most fundamental principles that underscore the American judiciary; "[t]hese important functions of Article III are too central to our constitutional scheme to risk their incremental erosion." *Schor*, 478 U.S. at 861 (Brennan, J., dissenting). As Justice O'Connor once advised:

> [T]he vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal "the essential attributes of judicial power."

Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U.J. Int'l L. & Pol. 35, 42 (1995) quoting *Schor*, 478 U.S. at 851. While the outer limits of "the essential attributes of judicial power" may be arguable, "no power is more clearly conferred by the Constitution and laws of the United States, than the power of this [C]ourt to decide, ultimately and finally, all cases arising under such Constitution and laws. . . ." *Ableman v. Booth*, 62 U.S. 506, 525

(1858); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Such an "essential attribute[]" of judicial power "extend[s] to all Cases, in Law and Equity, arising under . . . Treaties. . . ." U.S. Const. art. III, § 2. Thus, the Constitution explicitly grants the federal judicial branch the sole authority to interpret treaties, and any attempt by the President to subordinate this Court to ICJ interpretations of treaties is unconstitutional. This Court has correctly held, therefore, that ICJ decisions interpreting treaties, such as the Vienna Convention, are entitled only to "respectful consideration" by this Court as it fulfills its constitutional obligation to interpret such treaties. *Sanchez-Llamas v. Oregon*, ___ U.S. ___, 126 S.Ct. 2669, 2683 (2006) (citing *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

B. Assuming, *Arguendo*, That The Judicial Power, Under Rare Circumstances, May Be Vested In Non-Article III Courts, Those Rare Circumstances Do Not Include The Vesting Of Judicial Powers In The ICJ.

Even if this Court were to hold that Article III does not absolutely proscribe the vesting of judicial powers in non-Article III courts, the President would still lack the authority to vest jurisdiction over the Vienna Convention in the ICJ. Although, "[o]n its face, Article III, § 1 seems to prohibit the vesting of any judicial functions in [non-Article III courts,] [t]he Court has [] recognized three narrow exceptions to the otherwise absolute mandate of Article III: territorial courts . . . courts-martial . . . and courts that adjudicate certain disputes concerning public rights. . . ." *Commodity Futures Trading Comm'n*, 478 U.S.

at 859 (Brennan, J., dissenting) (internal citations omitted).[3] None of these narrow exceptions can be applied to permit the President to vest the ICJ with supreme and exclusive jurisdiction over treaties ratified by the United States and adopted into American law.

Territorial courts, which do not possess Article III protections, have been held constitutional "in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (referring to U.S. Const. art. IV, § 3) *see also McAllister v. U.S.*, 141 U.S. 174, 184 (1891) ("It must be regarded as settled that courts in the territories [are] created under the plenary municipal authority that [C]ongress possesses over the territories of the United States, [and] are not courts of the United States created under the authority conferred by [Article III].").

In contrast, while the President has significant power over foreign relations (*see U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)), his power over the rest of the world is far from plenary. Specifically, the President

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[3] Under a fourth exception, this Court has permitted the vesting of Article III powers in a non-Article III court so long as it is an "adjunct" to an Article III court. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion of Brennan, J., and concurrence of Rehnquist, J.); *U.S. v. Raddatz*, 447 U.S. 667 (1980); *Crowell v. Benson*, 285 U.S. 22 (1932). Medellín is not arguing, however, that the ICJ is merely an adjunct of the federal courts. Had he made such an argument, he would, in effect, be conceding that this Court's holdings in *Sanchez-Llamas* and *Breard* – that ICJ opinions are only to be given "respectful consideration" – would control.

may not "make all needful rules and regulations" over the rest of the world that might enable him to vest the judicial power in a non-Article III court, such as the ICJ. Even assuming, *arguendo*, that the President's broad foreign relations power grants him the authority to bind the United States in disputes that arise outside the nation's borders to any needful rules or regulations agreed upon by other nations, he surely may not bargain away the Article III protections of those to whom the Constitution applies: "citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere. . . ." *Ross v. McIntyre*, 140 U.S. 453, 464 (1891). Interpreting the Constitution to permit such an egregious aggrandizement of domestic power could jeopardize the entire constitutional structure. *See* Section II, *infra*.

Similarly, this Court has held that Congress may vest the judicial power in military courts, which lack Article III protections, pursuant to Congress's expressed powers to "provide and maintain a navy[,]" and to "make rules for the government and regulation of the land and naval forces." *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 71 (1857) (citing U.S. Const. art. I, § 8, cl. 13-14). However, it cannot be legitimately argued that such congressional powers also enable the President to vest the ICJ with Article III judicial powers.

Under the third narrow exception, a non-Article III court may adjudicate "public rights." *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67 (1982) (plurality opinion of Brennan, J.) (citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856)). For a right to be deemed public, it must either (1) "arise between the Government and persons subject to its authority" (*Atlas Roofing Co. v.*

Occupational Safety and Health Review Comm'n, 430 U.S. 442, 450 (1977)), or (2) be "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution. . . ." *Granfinanciera*, 492 U.S. at 54.[4] "In essence, the public rights doctrine reflects simply a pragmatic understanding that, when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568, 589 (1985).

Cases before the ICJ meet none of these public rights criteria. Pursuant to Article 34(1) *Statute of the ICJ*, "Only states [*i.e.*, nations] may be parties in cases before the Court." Thus, at no time would a case before the ICJ arise between any government and persons subject to its authority.[5] Nor are ICJ interpretations of treaties mere administrative endeavors that "could be conclusively determined by the Executive and Legislative Branches." Instead, treaty interpretations are reserved exclusively to the judicial branch. *See* Section I(A), *supra*.

Though recent decisions by this Court are unclear, it has been argued that a balancing test, weighing a number of factors, none of which is dispositive, should be used to determine whether Article III powers may be vested in a

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[4] An independent judiciary is particularly essential in "public rights" cases between the government and a private citizen, making the Article III protections especially indispensable in such cases.

[5] Although treaties "generally do not create private rights . . . " (Restatement (Third) of Foreign Relations Law of the United States § 907 (comment (a)), the public rights created by treaties are not the type of public rights for which the "narrow exception" was crafted.

non-Article III court. *See Schor*, 478 U.S. at 851. One such factor cited by this Court gives consideration to "the concerns that drove Congress to depart from the requirements of Article III." *Id.* However, as Justice Scalia explained:

> [O]ne can[not] preserve a system of separation of powers on the basis of such intuitive judgments regarding "practical effects," no more with regard to the assigned functions of the courts, *see Mistretta v. United States*, 488 U.S. 361 [] (1989) (Scalia, J., dissenting), than with regard to the assigned functions of the Executive, *see Morrison v. Olson*, 487 U.S. 654 [] (1988) (Scalia, J., dissenting). This central feature of the Constitution must be anchored in rules, not set adrift in some multifactored "balancing test" – and especially not in a test that contains as its last and most revealing factor "the concerns that drove Congress to depart from the requirements of Article III." *Schor, supra*, 478 U.S., at 851 [].

Granfinanciera, 492 U.S. at 70 (Scalia, J., concurring). Instead, the vesting of the judicial power in non-Article III tribunals should be "limit[ed] . . . to [those] few, long-established exceptions." *Schor*, 478 U.S. at 859 (Brennan, J., dissenting). By vesting the power to interpret treaties in the ICJ, the President did not act pursuant to any of these narrow exceptions. As a result, his action was unconstitutional.

II. THE PRESIDENT DOES NOT HAVE THE POWER TO RULE BY DECREE ON DOMESTIC ISSUES.

It has been said that, pursuant to Article II of the Constitution, the President is the "sole organ" and has

plenary power over "international relations." *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Although the President clearly has "a degree of independent authority to act" with regard to foreign relations, *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003), the plain language of the Constitution reveals that it is not entirely accurate to describe his powers as plenary. Indeed, the Constitution enumerates certain powers in the international sphere to Congress. For example, Congress has the power to "provide for the common Defence" and impose "Duties, Imposts and Excises," U.S. Const. art. I, § 8, cl. 1; "regulate Commerce with foreign nations," *id.* cl. 3; "establish a uniform Rule of Naturalization," *id.* cl. 4; "regulate the Value . . . of foreign Coin," *id.* cl. 5; "declare War," *id.* cl. 11; "raise and support Armies," *id.* cl. 12; "provide and maintain a Navy," *id.* cl. 13; and "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14. Furthermore, the President can "make Treaties" only with the advice and consent of two-thirds of the Senate, *id.* art. II, § 2, and shall "appoint Ambassadors, other public Ministers and Consuls" with the "Advice and Consent of the Senate." *Id.* Importantly, Congress alone has the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* art. I, § 8, cl. 18.

These foreign relations powers were delegated expressly to Congress to ensure a system of separation of powers and checks and balances. *See* Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 260-61 (2001). Indeed, there is little doubt that one of the most fundamental

principles enshrined in the Constitution is that of separation of powers. *See Mistretta*, 488 U.S. at 380 ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."). James Madison, "in writing about the principle of separated powers, said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" *Id.* (citing *The Federalist* No. 47 (James Madison)). A system of checks and balances was built into the Constitution to protect this separation of powers. *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). The ultimate purpose behind this separation of powers was to protect individual liberties from a tyrannical government. *Loving v. U.S.*, 517 U.S. 748, 756 (1996) (citing Montesquieu, *The Spirit of the Laws* 151-52 (T. Nugent transl. 1949)).

This is particularly true in the realm of foreign relations, as Alexander Hamilton explained:

> [T]he vast importance of the trust and the operation of treaties as laws plead strongly for the participation of the whole or a portion of the legislative body in the office of making them . . . [I]t would be utterly unsafe and improper to intrust [the power of making treaties] to an elective magistrate . . . The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States. It must

> indeed be clear to a demonstration that the joint possession of the power in question, by the President and Senate, would afford a greater prospect of security than the separate possession of it by either . . .

Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. Rev. 133, 160-61 (1998) (citing *The Federalist* No. 75 (Alexander Hamilton)).

Likewise, James Wilson, perhaps the "most learned and profound" of all the framers (Robert Green McCloskey, *Introduction to the Works of James Wilson* 2 (Robert Green McCloskey ed., 1967)), observed that "neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people." 2 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 507 (1836 ed.) (statement of James Wilson to the Pennsylvania ratifying convention).

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *see also The Federalist* No. 51 (James Madison) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.

Hence a double security arises to the rights of the people."). Thus, the framers created a limited government of enumerated powers, with the residual powers left with the States. U.S. Const. amend. X; *Alden v. Maine*, 527 U.S. 706, 713-14 (1999); *see also Sabri v. U.S.*, 541 U.S. 600, 611 (2004) (citing *McCulloch v. Maryland*, 4 Wheat. 316, 423 (1819)).

In this case, the President addressed a memorandum to the Attorney General mandating that all "State courts give effect" to the ICJ opinion. Assuming, *arguendo*, that this memorandum constitutes either an executive order or an executive proclamation, the authority of the President must be scrutinized carefully. "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Respondents, in their brief, have explained thoroughly why there is no expressed or implied congressional authorization for this executive order. Respondent's Br. in Opp., 19-21. Therefore, the President must derive his authority solely from the Constitution. Indeed, in *Medellín v. Dretke*, the United States, in its *amicus curiae* brief, has argued that the President's authority to issue his directive rests, at least in part, "on the President's authority under Article II of the Constitution to manage foreign affairs." Br. For U.S. as *Amicus Curiae* at 44, *Medellín v. Dretke*, *supra*; *see also* Brief For Petitioner at 28-41; Br. For U.S. as *Amicus Curiae* at 12-13.

Clearly, though, the President cannot rule domestically by fiat, simply by relating the decree, even tangentially, to foreign affairs. *See Youngstown*, 343 U.S. at 587 (in the context of foreign relations, "the President's power to see that the laws are faithfully executed refutes the idea

that he is to be a lawmaker."); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2773 (2006) ("'The power to make the necessary laws is in the Congress; the power to execute in the President.'") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139-40 (1866)). Interpreting the Constitution to grant such power would undermine both the notions of a limited federal government and of separation of powers. Instead, there must be some line drawn delineating what the President may do domestically, pursuant to his foreign relations power, and what domestic activities exceed the scope of his power.

By returning to the text of the Constitution, and its fundamental principles of separation of powers and a limited federal government, such a distinction may be discerned. The only enumerated power that could, theoretically, grant the President the authority to issue such a domestic directive is Article II, § 3, under which the President has a duty to "faithfully execute[]"[6] the laws of the land, which, pursuant to Article VI, § 2, includes treaties.

This Court has recognized that treaties can be either self-executing or non-self-executing:

> When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by [C]ongress as legislation upon any other subject.

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[6] It is likely the Framers and their contemporaries defined the execution of the laws as "performing" the law or "to put in act the laws." Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267 n.84 (citing Samuel Johnson, *A Dictionary of the English Language* (7th ed. 1785)).

> If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

Whitney v. Robertson, 124 U.S. 190, 194 (1888).[7]

When a treaty is not self-executing, there is no domestic component to execute faithfully. It follows, then, that the President lacks the power to dictate domestic law pursuant to a non-self-executing treaty. Therefore, as to the Vienna Convention, the question is whether the provision that President Bush is attempting to execute is self-executing.[8] If the treaty is non-self-executing, the President clearly exceeded the scope of his power by issuing the memorandum. Simply put, because no law would exist to execute, the President would, in effect, be making new law, violating the doctrine of separation of powers.

On the other hand, if the Vienna Convention is self-executing, the President may "put in act" the law by executing the domestic component of the law. In such a

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[7] The power to enact such implementing legislation is vested in Congress, U.S. Const. art. 1, § 8, cl. 18 (Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."), and that power is checked by the President. *Id.* § 7.

[8] Notwithstanding this Court's holdings in *U.S. v. Belmont*, 301 U.S. 324 (1937), *U.S. v. Pink*, 315 U.S. 203 (1942), *Dames & Moore v. Regan*, 435 U.S. 654 (1981), and *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), executive agreements may never be self-executing without seriously impinging on the doctrines of separation of powers and a limited federal government. To hold otherwise would empower the President to dictate domestic law without any "check" by two-thirds of the Senate, or by Congress as a whole.

case, the issuance of the President's memorandum must be interpreted as an execution of a Vienna Convention provision providing for preemption of state procedural laws. However, no such provision exists in the Vienna Convention, contrary to the non-binding opinion of the ICJ.

It is, of course, well established that the judicial power, which extends to treaties, is vested in the Supreme Court. U.S. Const. art. III, §§ 1-2; *see* Section I, *supra*. "And, as Chief Justice Marshall famously explained, that judicial power includes the duty to 'say what the law is.'" *Sanchez-Llamas*, 126 S.Ct. at 2684 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

This Court has interpreted the Vienna Convention as being *subject to* domestic procedural rules. *Sanchez-Llamas*, 126 S.Ct. at 2687. Therefore, the President, with his memorandum, is attempting to execute a provision in a law that this Court has refused to recognize. Furthermore, the President is attempting to execute a law in a manner contrary to this Court's interpretation of that law, which usurps the power of this Court and violates the doctrine of separation of powers.

Ultimately, regardless of whether the President relies on his general foreign relations power or on his power to execute treaties, his executive decree flagrantly violates bedrock principles in the Constitution, the separation of powers and a limited federal government.

CONCLUSION

Because the Constitution expressly delegates the judicial power to courts that provide certain Article III protections, any attempt by the President, with the advice and consent of the Senate, to vest the judicial power in the ICJ, which lacks such Article III protections, is *ultra-vires*. Therefore, this Court should hold that the *Avena* judgment of the ICJ does not bind domestic courts. Additionally, this Court should hold that the President exceeded his constitutional foreign affairs authority and undermined essential constitutional doctrines by issuing his executive decree.

Respectfully submitted,

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